90-138

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

RICHARD G. BENNETT

Petitioner

v.

STATE OF ARKANSAS

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

THE QUESTION PRESENTED FOR REVIEW IS WHETHER THE NINE-YEAR DELAY BY THE STATE OF ARKANSAS IN FILING THE MURDER CHARGE AGAINST THE DEFENDANT CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE UNDER AMENDMENT 5 AND AMENDMENT 14, CONSTITUTION OF THE UNITED STATES.

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REPORT OF OPINION BELOW

The opinion of the Arkansas Supreme Court is *Richard Bennett v. State of Arkansas*, 302 Ark. 179 (1990).

JURISDICTION

Judgment of the Supreme Court for the State of Arkansas was entered on April 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment 5, Constitution of the United States, provides in pertinent part:

> No person shall be deprived of life, liberty or property, without due process of law.

Amendment 14, §1, Constitution of the United States, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On May 22, 1987, the Petitioner, Richard Bennett, was charged by Felony Information with First Degree Murder in the nine-year-old death of his wife, Marcia Good Bennett, who drowned in the Arkansas River on March 25, 1978. The charges were filed by the

Respondent, State of Arkansas.

The case was first tried to a jury on January 19, 1988, and the Defendant was found guilty and sentenced to life in prison. The Arkansas Supreme Court reversed the conviction and remanded the case for a new trial. Defendant's Motion for Change of Venue was granted to Conway County, Arkansas, where the trial commenced on April 17, 1989.

Prior to trial, the Defendant filed a Motion to Dismiss based upon pre-indictment delay in the filing of charges, which was denied by the Court. This Motion to Dismiss was based upon the precharging delay violating the Due Process Clause of the United States Constitution. This Motion to Dismiss was denied by the Court. At the trial of the case, the prosecution claimed the Defendant pushed his wife off the Arkansas River bridge near Morrison Bluff while they were fishing from the bridge and subsequently the Defendant entered the water and forcibly drowned Marcia Good Bennett. There were no eyewitnesses. The prosecution presented testimony that the Defendant and the victim had been married for a little over three months at the time of death and the Defendant received approximately $30,000.00 in life insurance proceeds and an additional amount as the sole beneficiary of the victim's estate.

The Defendant and his wife were from the

Dayton, Ohio area and were visiting Arkansas to purchase property near Morrison Bluff in Logan County for the purpose of building a drive-through liquor store. The Defendant had previously visited the area with a former girlfriend, Connie Mosier. The Court granted Defendant's Motion in Limine prohibiting Connie Mosier from testifying concerning a life insurance policy that the Defendant took out on Mosier while they were dating. Mosier was also prohibited from testifying in certain other areas. During the defense portion of the case, the Defendant testified that he was not aware that he was the beneficiary of the life insurance policy of Marcia Good Bennett until after her death. Over the objection of the Defendant, the Court allowed Connie Mosier to testify in rebuttal that the Defendant attempted to obtain a life insurance policy on her life and that the relationship ended when the insurance policy was rejected.

The Defendant, who is a veteran of the United States Navy with an honorable discharge (T. 653), denied the statements of Connie Mosier and testified that his wife accidentally fell off the bridge and drowned in the cold water before she could be rescued. The case was tried to a jury and after four days of trial the jury returned a verdict of guilty and sentenced the Defendant to life in prison.

The conviction was again appealed to the

Arkansas Supreme Court, in which the Defendant argued that the trial court erred in failing to grant Defendant's Motion to Dismiss for precharging delay of nine years. The Supreme Court of Arkansas reversed the conviction on other grounds and remanded the case for a new trial. The Arkansas Supreme Court refused to dismiss the charge based upon the precharging delay of nine years.

At the hearing before the trial court on the Motion to Dismiss for precharging delay, the defense presented evidence that the state police investigation was completed in 1979 and the investigation file was delivered to the then-Prosecuting Attorney, Tom Tatum, for his review and prosecutorial decision. The Prosecuting Attorney advised that he did not intend to file charges against Richard Bennett in connection with the death of Marcia Bennett. Defendant argued that the State had no legitimate prosecutorial reason for delaying the filing of charges for nine years and that such delay violated Defendant's due process. The State argued that the delay was reasonable because additional evidence was uncovered.

Petitioner now filed this Petition for Writ of Certiorari for the reason that the Arkansas Supreme Court has decided this issue contrary to the applicable decisions of this Court.

ARGUMENT

The question presented for review is whether the Defendant's due process rights guaranteed under Amendment 5 and Amendment 14 to the United States Constitution were violated by the delay of nine years in bringing the murder charges against him.

On May 22, 1987, the State of Arkansas filed a Felony Information against the Defendant, charging him with the First Degree Murder of Marcia Good Bennett which allegedly occurred on March 25, 1978. The nine-year delay by the State of Arkansas in filing the murder charge against the Defendant constitutes a violation of the Defendant's constitutional rights to due process, which entitles the Defendant to a dismissal of the charge.

The United States Supreme Court has ruled that the due process clause protects against "oppressive delay" in the bringing of charges. *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044 (1977). Preindictment delay will be sufficiently "oppressive" to warrant dismissal of the charges where the delay was unreasonable and substantially prejudicial to the Defendant in the presentation of his case. *Lovasco, supra.* The Court further stated that where actual prejudice is established, the Court must balance the reasons for the delay against the resulting prejudice.

In *Lovasco*, this Court considered a preindictment delay of approximately eighteen months. The Court also dismissed a previous case, *United States v. Marion*, 404 U.S. 307 (1971), in which there was a five-year delay in the government bringing criminal charges. There have been other cases considered by the various circuits, as well as the U. S. Supreme Court, and Petitioner knows of no case in which the prosecutorial delay was as many as nine years. The instant case gives this Court an opportunity to clarify the law on the question of at what point does precharging delay constitute a violation of the due process clause.

The Eighth Circuit Court of Appeals in the *United States v. Naftalin*, 534 F.2d 770 (1976), discussed a case in which the district court found that a four and one-half year delay between the time of full governmental knowledge and the bringing of criminal charges was "outrageous." The Eighth Circuit pointed out that as preindictment delay increases, the specificity with which prejudice must appear diminishes. *United States v. Naftalin, supra* at page 773. As will be discussed below, Richard Bennett adequately demonstrated to the Court prejudice which resulted in the nine-year precharging delay. Under *United States v. Naftalin*, it can be argued that the prejudice can be assumed in light of the unreasonably long period of time between full governmental knowledge and charges being filed.

The Supreme Court of Arkansas has also addressed this issue in a series of cases beginning with *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978). In the *Scott* case, the Defendant was convicted of capital murder and the Supreme Court reversed the conviction because the Defendant was able to show prejudice to the defense from a three-year delay in filing the murder charge. The Supreme Court remanded the case and directed that the charge should be dismissed unless the State could come forward with a satisfactory reason for the delay. The Supreme Court pointed out that just because the Statute of Limitations does not run on a murder charge does not mean that a person can be brought to trial at any time. The Supreme Court of Arkansas followed the direction of the U. S. Supreme Court in the *Lovasco* decision, *supra.*

The Defendant, Richard Bennett, filed a Motion to Dismiss on the basis of Pre-Charging Delay. (T. 51) The State responded and opposed the Motion to Dismiss. (T. 106) The Court conducted a hearing on Defendant's Motion to Dismiss, received testimony and denied the Motion. (T. 210-237)

At the hearing, the Defendant presented the testimony of Investigator Jack Knox, who had thirty years of experience in the investigation of cases with the Federal Bureau of Investigation. (T. 211) Mr. Knox assisted the defense in the investigation of the charges and

testified that in the course of his investigation he discovered that a number of items of tangible evidence were no longer available. These included items of fishing equipment that would have corroborated Mr. Bennett's testimony and also a ring that was given by Mr. Bennett to Sheriff Hamilton. Mr. Knox testified that these items, as well as other items of tangible evidence, would have been extremely beneficial to corroborate Mr. Bennett's story as to what happened when he was fishing on that evening. (T. 212) Mr. Knox also testified that a key witness, Carl Glass, was deceased and he would have been a key witness in Mr. Bennett's defense. Mr. Glass was present while the defendant was interviewed by Investigator Bailey. (T. 582)

The defense also presented to the Court a letter of April 13, 1979 from Sergeant Doug Stevens of the Arkansas State Police to Mr. Bud Clark, agent in charge of the Bureau of Criminal Identification in Ohio. (T. 216) The letter recites the facts of the case known to the State Police in 1979 and in fact enclosed a copy of the complete investigation file, which was broken down into four volumes. (T. 219) Sergeant Stevens' letter requested Mr. Clark to pursue a couple of additional leads. Mr. Clark responded by letter of June 29, 1979 and stated that the interviews had been completed. (T. 224) Approximately one year later, on March 21, 1980, Sergeant Stevens presented the entire case to the then-Prosecuting Attorney, Tom Tatum, for his review and

prosecutorial decision. Prosecuting Attorney Tatum advised that he did not intend to file charges against Richard Bennett in connection with the death of Marcia Bennett. (T. 225)

Defendant contends that all of the evidence and witnesses were known to the Prosecuting Attorney in 1980 when the decision was made not to prosecute and without any additional evidence being developed, the State arbitrarily decided to file charges against Richard Bennett on May 22, 1987.

The State contends that the delay was reasonable because additional evidence was uncovered, including the following:

(a) Dixie Rittenhouse, the Defendant's sister, testified at his civil trial that Richard Bennett was a lifetime cheat.

(b) The Defendant's depositions in the civil trial showed conflicting statements.

(c) The investigation for the civil trial uncovered the fact that on March 20, 1978 the Defendant entered a safety deposit box and on the same day he opened a bank account with a deposit of $60,000.00.

(d) Bonnie Butcher testified in the civil trial of

her fear of the Defendant.

(e) Connie Mosier was the Defendant's girlfriend before he married the victim, Marcia Good Bennett, and the Defendant took out a life insurance policy on her and made him the beneficiary. (T. 106-107)

The reasons for the delay as presented by the Prosecutor do not justify a delay of nine years. First, Dixie Rittenhouse only testified as a character witness against the Defendant at the civil trial in Ohio. (T. 213) Further, Dixie Rittenhouse was not used by the State in the trial of the instant case nor in the trial of the first case.

It is true that the Defendant gave his deposition in the civil trial investigation but that deposition was given on August 29, 1983, four years before the charges were filed in this case. (T. 236) Also, the State was fully aware of any inconsistencies in the statements of Richard Bennett since he had been interviewed by Dub Hamilton and Investigator Bailey within days after the drowning incident. Also Sergeant Doug Stevens had interviewed the Defendant approximately nine months later. All within two years of the date of the incident.

In reference to the $60,000.00 deposit into the bank account and the Defendant entering a safety deposit box prior to the trip to Arkansas, this was clearly avail-

able and known to the State during the investigation which was completed in 1980. The letter of Sergeant Stevens refers to his investigation showing that Marcia Good Bennett had changed her will to designate Mr. Bennett as the beneficiary shortly before the trip to Arkansas; that a life insurance policy was purchased in which Mr. Richard Bennett received approximately $30,000.00 in proceeds; and that he also was the beneficiary of the estate. (T. 219-220) In addition, Sergeant Stevens' letter requests Mr. Bud Park to obtain additional financial information of the Bennetts and Mr. Bud Clark indicated he did so in his letter of June 29, 1979. (T. 224)

In reference to Bonnie Butcher, Sergeant Stevens' letter of April 13, 1979 indicates that Bonnie Butcher was known as a potential witness and interviewed by Mr. Bud Clark. (T. 223-224)

Finally, the statements of Connie Mosier and the insurance policy taken out on her were known by the State in 1979. (T. 220) Clearly, all the evidence was in and fully developed in 1979 and all of the evidence was presented to the Prosecutor in 1980. There was no additional evidence developed between 1980 and the time the charges were filed in 1987. The State has not presented any justifiable reason for the delay.

In order for the Defendant to prevail on this

issue, the Defendant must show actual prejudice to him from the nine-year delay in filing the murder charge. In this case, the Defendant met this burden by showing the death of a very key witness, Carl Glass, as well as the fact that the State lost numerous items of key evidence that would have corroborated the Defendant's account of what happened when Marcia drowned. This constitutes actual prejudice. The case of the State was based upon circumstantial evidence and also the allegedly contradictory statements of the Defendant. In this type of case, the passage of time made it extremely difficult if not impossible for the Defendant to reconstruct the events that occurred in 1978 and the circumstances surrounding those events.

There's also evidence of governmental negligence in this case. The key items of evidence were kept by the previous Sheriff, Dub Hamilton, in the evidence locker until his retirement in 1980. (T. 524) Sheriff Hamilton testified he turned over these items of evidence to his successor, Bill Kimbriel. (T. 524) Sheriff Bill Kimbriel testified that he never did receive these items of evidence and he does not know where these items are located today. (T. 785) The combination of the unreasonable delay and the negligence on the part of the State has resulted in substantial prejudice that prevented the Defendant from due process in this case. Clearly, the courts grant the government considerable leeway in its timing of the arrest and indictment but when prejudice

results from unreasonable delay or as a result of governmental negligence, then such delay is deemed to be a denial of due process. *United States v. Lovasco, supra; United States v. Rogers*, 639 F.2d 438 (8th Cir. 1981); *United States v. Bartlett*, 794 F.2d 1285 (8th Cir. 1986); *United States v. Taylor*, 603 F.2d 732 (8th Cir. 1979).

As noted by Justice White in his dissenting opinion in *Hoo v. United States*, 484 U.S. 1035 (cert. denied), the issue presented by this petition for certiorari is what is the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment. The Second Circuit has held that there was no due process violation when there is no showing of an improper prosecutorial motive. *Hoo v. United States*, 825 F.2d 667 (2d Cir. 1987). However, other circuits have concluded that intentional misconduct is not the *sine qua non* for a due process violation from prosecutorial preindictment delay, and instead those circuits hold that the proper inquiry is to balance the prejudice to the defendant against the government's justification for delay. *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985).

In addition, the Fifth and Seventh Circuits have acknowledged conflicts between decisions from their own circuits on this issue. *Dickerson v. Louisiana*,

816 F.2d 220 (5th Cir.); *United States v. Hollins*, 811 F.2d 384 (7th Cir. 1987). Because there is a continuing conflict among the circuits on this important question of constitutional law, this case is ripe for resolution by this Court, and certiorari should be granted.

Respectfully submitted,

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Appendix

Supreme Court of Arkansas
No. CR 89-149

RICHARD G. BENNETT,

Appellant,

v.

STATE OF ARKANSAS,

Appellee.

Opinion Delivered April 30, 1990.

Appeal from the Circuit Court of Conway County, #CR 87-24; The Honorable Charles Eddy, Judge.

Reversed and Remanded.

ROBERT H. DUDLEY, *Associate Justice*

This case is on appeal for the second time. The appellant, Richard G. Bennett, previously was found guilty of first degree murder and sentenced to life imprisonment. We reversed that conviction, holding that it was prejudicial error to admit prosecution testimony by deposition in the absence of a showing of unavailability of the witness. *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988). A change of venue was granted, and upon retrial, the appellant was again convicted and sentenced to life imprisonment. Again, we must reverse and

remand for a new trial.

Appellant makes two assignments of error which he contends mandate reversal and dismissal. Neither one has merit. He makes six other assignments of error which he contends mandate reversal and remand. One of them is meritorious. It concerns the time and manner of giving instructions. By necessity, we first address those points asking for reversal and dismissal.

Appellant argues that his conviction must be reversed and dismissed because of insufficiency of evidence. The argument is without merit. Essentially the same evidence was presented in this case as was presented at the first trial. In our earlier *Bennett* decision, this court declared:

> Based on the foregoing [recitation of evidence], we conclude that there is substantial evidence to support the verdict of guilt.

297 Ark. at 122, 759 S.W.2d at 803.

Where essentially the same evidence was presented at this second trial as in the first, and the appellant in his brief concedes that the evidence is essentially the same, the doctrine of the law of the case applies and sufficiency of the evidence is not a ground for reversal. *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985).

Appellant next argues that his conviction must be reversed and dismissed because of a delay of nine years in the filing of charges. This argument is also without merit.

On the day following the victim's death, the appellant gave a statement to the sheriff, a deputy sheriff, and a state police investigator. At the time the police did not know the victim had been murdered. The men met in a motel room in the presence of Carl Glass, appellant's attorney. Glass died in 1985, before the murder charge was filed.

In dragging the river where the victim was found, the authorities found a coat, a blanket, and a lantern cover, which were identified as items worn or used by the victim. The sheriff took custody of some fishing equipment found nearby as well as the aforementioned items found in the water. The appellant claimed that he gave the victim's ring to the sheriff; an assertion the sheriff denied. In any event, none of the aforementioned evidence could be produced by the sheriff's office by the time of the trial.

The appellant contends that the delay in charging until after the death of the attorney was prejudicial and insists that when it is coupled with loss of the items of evidence from the sheriff's office, a dismissal of

the charge is mandated.

We have recognized that there may be instances where prosecutorial delay in the bringing of criminal charges may constitute prejudicial error requiring a dismissal of those charges. Simply because the statute of limitations has not run, the State is not justified in unduly delaying the filing of charges. *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984). The key element, of course, is whether or not a prejudice results which would require a dismissal.

All of the witnesses testified about the items of property recovered at the scene with the exception of the victim's ring. The testimony concerning the disposition of the ring would have been controverted regardless of whether the case had been tried immediately following the incident or several years later. Where no controversy existed regarding the items of property received by the sheriff, it cannot be said that, simply because the property was not physically present at the trial, prejudice occurred.

Further, there is no allegation that the deceased attorney had any special knowledge which would have proved beneficial to the appellant at trial. Even though the attorney was present when the appellant gave his statement, the fact that he died before the appellant was charged fails to establish prejudice justifying a dis-

missal of the charges. Accordingly, we decline to reverse and dismiss the charges.

Appellant's next assignment of error is well taken. It concerns the time and manner of giving instructions to the jury and requires reversal and remand for yet another trial.

The trial judge did not orally instruct the jury at the conclusion of the evidence. Instead, after voir dire and before opening statements he orally instructed on the respective duties of judge and jury (AMCI 101); personal observations and experiences (AMCI 103); credibility of witnesses (AMCI 104); expert witness (AMCI 105); circumstantial evidence (AMCI 106); burden of proof (AMCI 107); the filing of the information not to be considered as evidence (AMCI 108); presumption of innocence (AMCI 109); reasonable doubt (AMCI 110); and first degree murder (AMCI 1502 and 1507).

Four days later, at the conclusion of the case, counsel for the appellant requested that the court again instruct the jury on all the applicable law. The court refused the request to repeat the instructions but did give oral instructions on the character evidence (AMCI 204) and the range of punishment (AMCI 6100).

Following closing arguments and upon the

retirement of the jury to deliberate, all of the instructions were given to the jurors in written form, for their use during deliberation. Appellant argues that the procedure used was in violation of the applicable law and he was prejudiced. The argument is well taken.

Arkansas Code Annotated §16-89-125 provides:

> **When the evidence is concluded,** the court shall, on motion of either party, instruct the jury on the law applicable to the case. . . .

The meaning of the statute is so clear that it does not need interpretation. It means just what it says.

The State, tacitly acknowledging its vulnerable position on this point, argues that A.R.Cr.P. Rule 33.3, when read in conjunction with the above quoted statute, authorizes the procedure utilized in this case. Rule 33.3 provides that upon request of counsel or juror "it shall be the duty of the presiding judge to deliver to the jury immediately prior to its retirement for deliberation a typewritten copy of the oral instructions given the jury." Rule 33.3 does not contravene or modify the statute. The rule is based upon the assumption that oral instructions are to be given at the conclusion of the evidence. The action of the trial judge in giving all but two of the oral instructions at the beginning of the trial was in violation of the statute.

The State argues that the error was harmless since all of the instructions were repeated at the conclusion of the trial by the trial judge giving the jury copies of the written instructions. We reject the argument.

Ten of the instructions were given orally at the beginning of the trial. At the end of the trial, four days later, two others were given orally. Under such circumstances jurors most likely selected and evaluated evidence concerning the subject matter of the initial ten instructions differently than they evaluated evidence dealing with the subject matter of the later two instructions. As described by Elwork, Sales and Alfini, *Making Jury Instructions Understandable*, §1-4(b) (1982):

> Psychologists have for years made distinctions between incidental and intentional learning. When given instructions as to what material they are expected to learn, people will learn it more effectively by concentrating on the relevant parts and paying less attention to the irrelevant ones. This effect has been shown empirically with many different types of materials and in many situations. Thus, it is reasonable to assume that if jurors knew what is relevant to their verdict at the beginning of the trial, they would be better able to focus on relevant evidence as it is being presented and later remember it.

On the other hand, when instructions are given

at the end of a trial, jurors probably evaluate the evidence on the basis of their own sense of justice. As explained in *Making Jury Instructions Understandable, supra:*

> [C]harging a jury at the end of a trial assumes that they passively listen to all of the evidence without evaluating it. For years psychologists have made similar assumptions about people who participated in their experiments. Recently, an entire area of research has refuted that assumption. Many researchers have shown that people in psychological studies do their best to figure out what the experiment is about and what the experimenter is trying to prove, and then proceed intentionally to make the experiment a success, although some do just the opposite. This entire area of research asserts that people are never passive receivers of information, but rather are con stantly and actively interpreting information and trying to find its meaning. If people are not passive in an experimental study, we have no reason to assume that jurors can be passive during a trial, a social situation in which human emotion is constantly displayed. Psychological knowledge would suggest that jurors are, like everyone else, active and selective receivers of information. Thus, it is reasonable to assume that while waiting for the instructions to be given at the end of the trial, jurors probably select and evaluate evidence in terms of their own sense of morality and justice.

Accordingly, the timing of the giving of instructions can make a difference in a verdict. As explained in *Making Jury Instructions Understandable, supra:*

> [T]wo studies have directly examined the effects of the timing of presentation of jury instructions. In one study, we found that the presentation of jury instructions before the evidence resulted in jurors having different sets of beliefs about the facts of a case. This finding can be understood in light of the arguments we presented above; that is, by presenting instructions at the beginning of a trial, jurors are more likely to selectively remember portions of the evidence that are truly legally relevant, as opposed to those that jurors might assume are relevant when they do not have the benefit of the instructions. What effect might a different set of beliefs about the facts have on a trial's outcome? The answer is obvious, but for the benefit of doubters, two researchers empirically demonstrated that the presentation of instructions before the trial creates changes in verdicts.

By mixing the time of giving instructions so that some are given at the beginning of the trial and some are given at the end of the trial, the jurors in this case most likely evaluated some of the evidence by selective recollection and the rest by incidental recollection. No person should have his liberty judged under such circumstances.

Prejudice may well have resulted for another, and even more important, reason. The trial judge initially instructed the jury on everything except character evidence and the range of punishment. Then, four days later, instructed on those two subjects. The jurors may well have inferred that the much respected trial judge, after hearing the evidence, thought the accused was guilty, and that is the reason he waited to give the punishment instruction. Certainly it was emphasized, and one instruction should not be emphasized over others. *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914).

Three other assignments of error must be addressed because they will likely arise again upon retrial, but none of them have merit.

In the first of these appellant argues that a statement he gave should be suppressed as evidence. The pertinent facts are as follows: On the day following the victim's death, the appellant, his attorney, the sheriff, a deputy sheriff, and a state police investigator met in a motel room for the express purpose of obtaining a statement from the appellant. Without giving any warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), the investigator asked the appellant to describe what had occurred the previous night. The appellant then made an oral statement.

Prior to the trial, a motion to suppress the

appellant's statement was filed, and after a hearing, the court denied the motion. The state police investigator denied that the appellant was suspected of any crime at that time; in fact, at that point the victim's body had not been recovered from an apparent natural drowning.

As noted in *Gardner v. State*, 296 Ark. 417, 54 S.W.2d 518 (1988), the warnings required by *Miranda v. Arizona*, *supra*, come into play only when the defendant is subjected to custodial interrogation or its functional equivalent. No *Miranda* warning is required if the questioning is purely investigatory.

At the time the statement was made, an attorney was present who identified himself as the appellant's counsel. The appellant testified at the suppression hearing that he did not feel compelled to stay or to talk to the officers. These circumstances presented a question for the trial court's resolution. We cannot say that a denial of the motion to suppress constitutes error.

The appellant next contends that the trial court committed reversible error in permitting the sheriff to testify as an expert witness. The trial court did not abuse its discretion because the sheriff testified he had a great deal of experience concerning the subject of his testimony.

Appellant next argues that the trial court erred

in refusing to admit into evidence a letter, but the letter in question is not abstracted as required by *Cox v. State*, Ark. 312, 772 S.W.2d 336 (1989). We have consistently held that the record to be considered on appeal is confined to that which has been abstracted. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989).

Appellant raises two additional points of appeal, neither of which has merit and neither of which is likely to arise upon retrial. Accordingly, we do not address them.

Reversed and remanded for a new trial.

In the Circuit Court
Of Logan County, Arkansas
Northern District

STATE OF ARKANSAS — PLAINTIFF
v. CR 87-21
RICHARD BENNETT — DEFENDANT

Order Denying Defendant's Motion to Dismiss

The Defendant's Motion to Dismiss and the State's Response having been filed with the Court and a hearing held on March 27, 1989 with the Defendant and his attorney W. Asa Hutchinson being present and the State of Arkansas being represented by William R. Bullock, Prosecuting Attorney and Steve Kirk, Chief Deputy Prosecutor, the Court hereby finds:

1. The Defendant's Motion to Dismiss the above-styled case because of undue delay by the State in filing an Information is denied.

So ordered this 3 day of April, 1989.

Charles H. Eddy
Circuit Judge

Judgment and Commitment Order

In the Circuit Court of Conway County, Arkansas

On April 19, 1989 the defendant personally appeared before the Court with legal counsel and, having been informed by the Court of the nature of the charge(s), of his constitutional and legal rights, of the effect of a guilty plea upon those rights, and of his right to make a statement before sentencing, the Court made the following findings:

Defendant was found guilty at jury trial.

Date of Birth: 6-19-1930
Race: W
Sex: M
Defendant's Attorney: Asa Hutchinson
Prosecuting Attorney: William R. Bullock

There being no legal cause shown by the defendant, as requested, why judgment should not be pronounced against him, a judgment of conviction is hereby entered against the defendant on each charge enumerated and court costs assessed. The County Sheriff is hereby ordered and directed to transport the defendant to the Arkansas Department of Correction, where he is sentenced to hard labor for the term specified on each charge:

Statute No. 41-1502
Offense: Murder First Degree
Offense Date: 3-25-78
Docket No.: Cr. 87-24
Counts: 1
F/M: F
Class: Y
Sentence: Life
Suspended: None
Time to Serve at A.D.C.: Life
Defendant informed to right to appeal.
Jail Time Credit: None
Bond Provisions: $100,000.00 bond
Date: 4-19-89

CHARLES H. EDDY
Circuit Judge

I certify this is a true and correct record of this Court with short report of circumstances attached.

CAROLYN GADBERRY
Circuit Clerk

I acknowledge receipt of judgment.

RICHARD BENNETT
Defendant